Finance Ltd v *Datuk Syed Kechik and Ors*[5] in Kuala Lumpur Civil Suit C23-1989-86. I agree with the views held by him that the borrowing does not make the act illegal by virtue of s 36 of the Act. Further, the non-obtainment of permission of the Controller before the borrowing puts the borrower or lender to risk of being prosecuted and sentenced under para 7 Part II of the First Schedule to the Act.

It was also held in *Contract and Trading Co (Southern) Ltd* v *Barbey & Ors*[6] that the Exchange Control Act 1974 does not provide a moratorium for debtors but controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court; thus discharging the debtor, and the fund itself remains out of the control of the creditor until consent had been obtained.

I therefore dismiss this appeal, and confirm the order of the senior assistant registrar dated 16 December 1989, in which he refused to set aside the registration of the judgment of the High Court of Singapore.

Appeal dismissed.

Solicitors: *Skrine & Co; Murthi & Partners.*

Reported by *Mathavan Devadas*

Pendakwa Raya v Gan Ah Lik

HIGH COURT (SHAH ALAM) — ULANG BICARA JENAYAH BIL 51-182-87
WAN YAHYA J
20 JANUARY 1990

Statutory Interpretation — Repeal of Act — Whether repeal implies revocation of subsidiary legislation made thereunder — Interpretation and General Clauses Ordinance 1948, s 11(2) — Interpretation Act 1967, s 65(2)

The respondent was charged for carrying on the trade of selling and storing gas cylinders without having first obtained a licence from the President of the Municipal Council Klang, thereby having contravened byelaw 1(1) Part VII of the Town Board Byelaws (Cap 137). He subsequently appeared before the magistrate at Klang but before any evidence could be led by the prosecution against him, the learned magistrate, acting on an objection made by his defence counsel, acquitted and discharged the respondent. The substance of the defence counsel's objection was that the repeal of the Town Board Enactment of the Federated Malay States (FMS Cap 137) ('the Act') had by implication revoked the subsidiary legislation made thereunder, ie the Town Board Byelaws ('the Byelaws').

Held, allowing the Pendakwa Raya's appeal:

(1) The repeal of the Act could not be impliedly construed as having revoked the Byelaws because the repealing Act did not expressly revoke the Byelaws and neither were any Byelaws inconsistent with the Byelaws made under the Act. Therefore the validity of the Byelaws is saved by the validating and deeming provision in s 11(2) of the Interpretation and General Clauses Ordinance 1948.

(2) The true construction of any written law must be established on the relevant provision of the interpretation laws in force at the time when the written law was made. Until a further interpretation law is enacted by Parliament, any existing written law in this country must be construed in accordance with either of the two interpretation laws in force at the time when such written law was passed.

(3) The Byelaws which were enacted in 1935 must be construed in accordance with the provision of the 1948 ordinance and when so construed must inevitably lead to the conclusion that the Byelaws are valid and still subsisting.

Cases referred to

1 *Daihatsu (Malaysia) Sdn Bhd* v *Pendakwa Raya* [1987] 1 MLJ 88 (not folld)
2 *Watson* v *Winch* [1916] 1 KB 688 (not folld)
3 *Cheam Gaik Chye* v *PP* [1967] 1 MLJ 51 (folld)
4 *Surtees* v *Ellison* (1829) 9 B & C 750; 109 ER 278 (refd)

Legislation referred to

Interpretation Act 1967 s 65(2)
Interpretation and General Clauses Ordinance 1948 s 11(2)
Local Government Act 1976 s 73
Town Board Byelaws (Cap 137) byelaw 1(1)
Town Board Enactment of the Federated Malay States (FMS Cap 137) s 16(1)

Hanafiah bin Zakariah (Timbalan Pendakwa Raya) for the appellant.
Thomas Mariasoosay for the respondent.

Cur Adv Vult

Wan Yahya J: On 21 October 1985, the respondent was found to be carrying on the trade of selling and storing gas cylinders without having first obtained a licence from the President of the Municipal Council, Klang. He was, accordingly, charged for having contravened byelaw 1(1) Part VII of the Town Board Byelaws (Cap 137). He subsequently appeared before the magistrate at Klang but before any evidence could be led by the prosecution against him, the learned magistrate, acting on an objection made by his defence counsel, acquitted and discharged the respondent.

The substance of counsel's objection, as I understand it, is that the repeal of the present Act, in this instance, the Town Board Enactment of the Federated Malay States (FMS Cap 137) had by implication revoked the subsidiary legislation made thereunder, ie the Town Board Byelaws. The dominant force of his argument, however is based on the authority of a 1986 High Court decision in *Daihatsu (Malaysia) Sdn Bhd* v *Pendakwa Raya*[1] wherein it was held that the Byelaws were invalidated by the repeal of Cap 137.

The prosecution officer on his part arduously attempted to suggest to the learned magistrate the possibility of this case having been decided per incuriam. He drew the

magistrate's attention to the Interpretation and General Clauses Ordinance 1957 and another High Court decision on a similar subject, and he even attempted to distinguish the case of *Watson* v *Winch*[2] which was cited in support of the afore-mentioned judgment; but the learned magistrate who appeared to be compulsively committed to the principle of stare decisis declined to consider these arguments.

Now, it is true that byelaw 1(1) of the Town Board Byelaws was made pursuant to s 16(1) of the Town Board Enactment (FMS Cap 137) and it is equally true that a substantial part of that enactment including s 16(1) had been repealed by the Local Government Act 1976. But such repeal to my mind could not be impliedly construed as having revoked the Town Board Byelaws which is the subsidiary legislation made under the enactment. This is so because the repealing Act, ie the Local Government Act 1976, did not expressly revoke the Byelaws made under the repealed enactment and neither were any Byelaws inconsistent with the former Byelaws made under s 73 of that Act. Therefore, the validity of the Town Board Byelaws is saved by the validating and deeming provision in s 11(2) of the Interpretation and General Clauses Ordinance 1948 which reads:

> Where a written law repeals in whole or in part any former written law and substitutes other provisions therefor, any subsidiary legislation made under the former written law shall, so far as it is not consistent with such substituted provisions, remain in force until revoked or replaced by subsidiary legislation made under the repealing written law, and shall be deemed for all purposes to have been made thereunder.

At the hearing before this court, counsel raised the argument that only one interpretation law should apply in construing any statutory instrument and that the Interpretation Act 1967 should apply in this case.

I am unable to accept that proposition. The true construction of any written law must be established on the relevant provision of the interpretation laws in force at the time when the written law was made. Although the Interpretation and General Clauses Ordinance 1948 was repealed by s 65(1) of the Interpretation Act 1967, sub-s (2) of that section goes on to state:

> Notwithstanding subsection (1), the Ordinance thereby repealed shall continue to apply to any written law to which it applied immediately before the commencement of this Act and to subsidiary legislation made after the commencement of this Act under such a written law.

Moreover s 2(2) of the Act expressly excluded the application of the Act on laws enacted prior to its commencement. Therefore, the proper law to be applied in the construction of the Town Board Byelaws is s 2 of the Interpretation and General Clauses Ordinance 1948 which reads:

> In this Ordinance, and in every written law as hereinafter defined, and in all public documents enacted, made or issued before or after the commencement of this Ordinance the following words and expressions shall, as from the commencement of this Ordinance and without prejudice to anything done prior thereto, have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided ...

Until a further interpretation law is enacted by Parliament, any existing written law in this country must be construed in accordance with either of the two interpretation laws in force at the time when such written law was passed. In respect of any written laws enacted after 18 May 1967 (the gazetted date of its operation), the Interpretation Act 1967 is the proper law to apply and as regards all laws enacted prior to this date the construction must be made in accordance with the Interpretation and General Clauses Ordinance 1948.

The Town Board Byelaws which were enacted in 1935 must be construed in accordance with the provision of the 1948 ordinance and when so construed must inevitably lead to the conclusion that the Byelaws are valid and still subsisting.

This is by no means an unprecedented ruling. In *Cheam Gaik Chye* v *PP*,[3] Ong Hock Sim J invoked the provision of the Interpretation and General Clauses Ordinance 1948 in construing the validity of the rule made under the repealed Fisheries Ordinance (SS Cap 146).

Finally, perhaps I should mention here that the case of *Watson* v *Winch*[2] cited in *Daihatsu*'s case[1] was a decision founded on the principle of common law of England in respect of a written law enacted in 1888, that is before the 1889 and 1978 Interpretation Act of the United Kingdom came into operation. To put it in another way, that judgment refers to the legal point of view applicable to the repeal of subsidiary legislation before the Interpretation Acts of 1889 and 1978 of the United Kingdom came into operation. The legal standpoint on this subject must necessarily be different after the Interpretation Act 1978 was enacted as s 17(2)(b) and s 22 of the United Kingdom 1978 Act had introduced a saving provision similar in effect to s 11 of our Interpretation and General Clauses Ordinance 1948. At p 690 of the judgment in *Watson* v *Winch*,[2] Lord Reading CJ after reading with approval the decision in *Surtees* v *Ellison*[4] on the established general rule that a repealed Act must be considered as if it had never existed, added the following qualification:

> To that passage it is only necessary to make one qualification, namely, that since the case, Lord Brougham's Act and the Interpretation Act 1889, have been passed, and one must now bear the later Act in mind.

For these reasons, the authority in *Watson* v *Winch*[2] would appear to be no longer applicable to any written laws enacted after 1948 in Malaysia and probably to British laws enacted after 1978.

On my part, I would hold that the Town Board Byelaws are still valid and subsisting and therefore s 1(1) of the Byelaws are still enforceable against the respondent. I shall therefore set aside the magistrate's order of acquittal and remit the case back to her court for the respondent to be tried in accordance with the same provisions as originally charged.

Appeal allowed.

Solicitors: *Azman Davidson & Co.*

Reported by *Kevin Mathews*

Tang Eng Iron Works Co Ltd v Ting Ling Kiew & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 144 OF 1989
HAIDAR J
3 JANUARY 1990

Companies and Corporations — Fraud on creditors — Application by creditor under s 304 of the Companies Act 1965 for declaration — Whether business of the company carried on with intent to defraud creditor — Whether directors personally responsible for the debts and liabilities of the company — Whether directors' actions amounted to fraud — Companies Act 1965, s 304

Civil Procedure — Commencement of action — Fraud — Application under s 304 of the Companies Act 1965 — Company not yet wound up — Whether action correctly commenced by originating summons — Rules of the High Court 1980, O 88 r 2

The plaintiffs had commenced an action against the defendants by way of originating summons under O 7 and O 88 r 2 of the Rules of the High Court 1980 and under s 304 of the Companies Act 1965. The defendants were appealing against the court's earlier decision granting the summons in favour of the plaintiffs. The defendants were directors of a company incorporated in Malaysia ('HLE'). The plaintiffs entered into two building contracts with HLE for construction works in a property to be known as Jade Tower ('the property'). The plaintiffs duly executed the works on the property, but HLE failed to pay the plaintiffs. An arbitration award was made in the plaintiffs' favour, and the said award was subsequently incorporated in a judgment dated 19 July 1988. The plaintiffs obtained an order for examination of the defendants as responsible officers of HLE in order to seek payment. The facts unearthed by the examination prompted the plaintiffs to bring the action commenced by the originating summons.

The plaintiffs relied on various grounds to show that the defendants intended to defraud the plaintiffs as creditors:

(i) An agreement dated 5 April 1984 showed that the first defendant attempted to pay the vendor for his share in HLE by disposing of HLE's assets.

(ii) In a memorandum of charge in favour of Public Finance Bhd ('PFB'), HLE had charged the property to PFB in consideration of moneys loaned for the express purpose for payment of construction work on the property. The defendants admitted that the loan moneys had been used to apply for a timber concession through a bumiputra third party instead.

(iii) The accounts for HLE showed that loans had been made by HLE to the directors, which loans had been subsequently merged into the sundry debtor's account. In addition, the moneys advanced to the bumiputra third party for the timber concession was not reflected in the accounts.

(iv) The property (which was the main asset of HLE) was transferred to a company for $3m five days after the arbitration award was made in favour of the plaintiffs at an undervalue.

Held, dismissing the defendants' appeal:

(1) Section 304(1) of the Companies Act 1965 would apply even prior to the winding up of a company. As HLE was not wound up yet, the action was correctly commenced by originating summons and not by writ under O 88 r 2.

(2) The onus was on the plaintiffs to show that the defendants had been guilty of dishonest fraud. Based on grounds (ii) to (iv) above, the plaintiffs had succeeded in showing that the defendants had intended to defraud the plaintiffs.

(a) The use of the loan moneys for a purpose other than what they were meant for constituted dishonest fraud.

(b) The loans to the directors were in breach of s 133 of the Companies Act 1965, and the defendants had tried to pull wool over the eyes of the plaintiffs by that fact in the accounts.

(c) The speed of disposal and registration of the property and the direct payment to PFB in settlement of HLE's debt showed a scheme to defraud the plaintiffs.

(3) The agreement dated 5 April 1984 was not sufficient to constitute dishonest fraud even though it might have been a breach of s 67 of the Companies Act 1965 (relating to giving of financial assistance for the purchase of assets).

Cases referred to

1 *Re Patrick & Lyon Ltd* [1933] All ER 590 (folld)
2 *Re Peace Insurance Co Ltd* [1964] MLJ 232 (refd)
3 *Lloyds Bank Ltd* v *Marcan & Ors* [1973] 3 All ER 754 (refd)
4 *Re Mahel Investments Pty Ltd and the Companies Act* (1979) 4 ACLR 35 (refd)

Legislation referred to

Companies Act 1965 ss 67, 133, 304
Evidence Act 1950 s 33
Rules of the High Court 1980 O 5 r 2(6), O 7, O 41 r 11, O 88 r 2

CJ Eng (Ms) (*KJ Foo (Ms)* with her) for the plaintiffs.
KY Lin (*Tony Bong* with him) for the defendants.

Cur Adv Vult

Haidar J: The plaintiffs, Tang Eng Iron Works Co Ltd, filed this originating summons (encl 2) under O 7 and O 88 r 2 of the Rules of the High Court 1980 and s 304 of the Companies Act 1965, for the following reliefs:

(1) A declaration that the business of Har Lee Enterprise Sdn Bhd has been carried on with intent to defraud creditors of the defendants.

(2) A declaration that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe shall be personally responsible, without any limitation of liability, for all of the debts or other liabilities of the said Har Lee Enterprise Sdn Bhd.